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In the

Supreme Court of the United States

October Term, 1953

NO. 544

MAURICE GUY BOWLING,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[redacted]

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BRIEF FOR PETITIONER

Maurice Guy Bowling prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on July 30, 1963.

REPORTS OF OPINIONS BELOW

The United States District Court for the Southern District of Florida entered judgment and imposed sentence, but did not deliver an opinion.

The Opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in any official or unofficial report. That opinion appears herein, however, at Appendix "A", Page

The Petition for Rehearing was denied by the United States Court of Appeals for the Fifth Circuit without rendition of an Opinion. The Order Denying Rehearing appears herein at Appendix "C", Page

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry is July 30, 1963. Rehearing was denied on September 12, 1963, without opinion. On September 18, 1963, the United States Court of Appeals for the Fifth Circuit issued an order staying its mandate for a period of thirty (30) days from September 12, 1963. The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether a trial court, when aware of the accused's history of mental disease, is under a duty scrupulously to avoid any action that might prevent the jury's impartial consideration of evidence bearing on the issue of the accused's insanity, and, therefore, whether or not the court below erred in affirming the conviction of Petitioner resulting from the verdict of a jury before which the trial court conducted partisan interrogation of the expert medical witness, virtually re-phrasing the crucial testimony of the neuropsychiatrist into legal terminology?

2. Whether the partnership of the trial judge, constituting failure scrupulously to avoid any action before the jury that might prevent its impartial consideration of evidence relating to the issue of Petitioner's insanity, when the trial judge knew of Petitioner's past record of mental disease, amounted to plain error, requiring reversal even though the point was not reserved for appeal by Petitioner's trial counsel?

STATUTORY PROVISIONS AND SUPREME COURT RULE INVOLVED

STATUTE: Federal Rules of Criminal Procedure, Rule 52(b)
18 U.S.C.A., Appendix "D", Page

SUPREME COURT RULE:

Supreme Court of the United States, Revised Rules, effective July 1, 1954. Rule 19, Considerations Governing Review on Certiorari, Sub-Paragraph 1(b), reading in part as follows:

"Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter."

STATEMENT OF THE CASE

The Petitioner, Maurice Guy Bowling, 23 years of age, was indicted upon four counts of violation of Title 26, United States Code, charging that he unlawfully possessed forty gallons of untaxed distilled alcoholic spirits, that he possessed a distilling apparatus set up which had not been registered, and that he manufactured eight hundred gallons of mash fit for

distillation of alcoholic spirits on premises other than an authorized distillery. (R. 1-2) The fourth count of the indictment was voluntarily dismissed by the United States as duplicitous. (R. 123)

Following his plea of Not Guilty, the Petitioner filed a "Suggestion of Incompetency at Time of Alleged Offense" (R. 3) and the Court ordered a mental examination of Petitioner by Dr. George J. McMahon of the United States by Navy Medical Corps at Jacksonville, Florida. (R. 11)

At the trial the only issue was Petitioner's competence at the time of the offenses. Petitioner contended that he had no recollection of the criminal acts due to psychomotor epilepsy. It was firmly established by both prosecution and defense evidence that Petitioner participated in the acts for which he was indicted.

The issue of Petitioner's competence at the time of the offense was resolved against him by the jury's verdict of guilty. (R. 145)

ARGUMENT

POINT ONE

WHEN, ALTHOUGH FULLY AWARE OF THE PETITIONER'S HISTORY OF MENTAL DISEASE, THE TRIAL JUDGE CONDUCTED PARTISAN INTERROGATION OF THE EXPERT MEDICAL WITNESS, DURING THE COURSE OF WHICH HE RE-PHRASED CRUCIAL TESTIMONY OF THE NEUROPSYCHIATRIST INTO LEGAL TERMINOLOGY, HE FAILED TO AVOID SCRUPULOUSLY ACTION THAT MIGHT PREVENT THE JURY'S IMPARTIAL CONSIDERATION OF EVIDENCE BEARING ON THE ISSUE OF PETITIONER'S INSANITY.

A. THE TRIAL JUDGE WAS FULLY AWARE OF PETITIONER'S HISTORY OF MENTAL DISEASE.

Attached to Petitioner's suggestion of incompetency was a report of Dr. William N. Chambers, a psychiatrist, dated July 31, 1958, concerning an examination made by Dr. Chambers at a time when Petitioner was under prosecution for another alleged criminal act. This report was made a part of the trial court file. (R. 6-10)

Dr. McMahon, the Navy neuropsychiatrist who testified at the trial, made repeated references to the report of Dr. Chambers, as well as to a medical history from the George Washington Hospital. (R. 51, 62, 71; R. 70)

Thus, the trial court was well aware that only seven months prior to the period during which the alleged offenses occurred, Dr. Chambers reported that Petitioner was suffering from

psychomotor epileptic attacks which prevented him from distinguishing between right and wrong. (R. 10)

Upon sentencing the Petitioner, the trial judge made the following comment, demonstrating his awareness of Petitioner's record of incompetency, as well as the legal consequences thereof:

> "I realize that a couple of years ago, Dr. Chambers made a report that he was having these spells and was not responsible and he was released." (R. 131)

B. WHEN THE TRIAL COURT IS AWARE OF THE DEFENDANT'S HISTORY OF MENTAL DISEASE, IT IS UNDER A DUTY TO AVOID SCRUPULOUSLY ANY ACTION THAT MIGHT AFFECT ADVERSELY AN IMPARTIAL CONSIDERATION BY THE JURY OF EVIDENCE ON THE ISSUE OF INSANITY.

In affirming Petitioner's conviction in the trial court, the United States Court of Appeals for the Fifth Circuit did not include in the body of the opinion rendered a specific ruling as to the question raised by Petitioner, then Appellant, concerning the special duty of the trial judge when he is aware of past mental disease in the accused's record. Nor did the court below make reference to the re-phrasing by the judge of the testimony of the expert witness neuropsychiatrist into legal terminology which Petitioner argues can only have tended to prejudice his case before the jury. [See Opinion, Appendix "A"]

The Petitioner bases this Petition for Writ of Certiorari upon a direct conflict between the ruling of the United States Court of Appeals for the Fifth Circuit in the case at bar and

the holding of the United States Court of Appeals for the District of Columbia, in the case of *Polisnik v. U.S.*, 259 F.2d 951 (C.A.D.C. 1958).

In the *Polisnik* case, a defendant whose records revealed that he had a psychopathic personality of a paranoid type, was charged with eight counts of forging and altering checks. The defendant was an older man than Petitioner, 23, and was charged with more serious and more deliberate crimes requiring more skill and sustained criminal activity over a longer period of time.

A standard for the conduct of a trial judge who presides over the trial of a defendant whom he knows to have a history of mental disease was clearly and emphatically declared by the Court in the following language:

> "In the face of Appellant's history, thus revealed to the trial court, we think the court was under the duty of scrupulously avoiding any action that might prevent an impartial consideration by the jury of such evidence as was put before it on the insanity issue." *Polisnik v. U.S.*, 259 F.2d 951, at 952.

In affirming the conviction of the Petitioner, the United States Court of Appeal for the Fifth Circuit stated:

> "What was said by Circuit Judge Wisdom in *Herman v. United States*, 289 F.2d 362, on the same issue is a complete answer to the question raised by Appellant in this case and the Court relies upon the decision in the *Herman* case in finding and holding that this case should be and it is affirmed." [Opinion, p. 4, Appendix "A"]

An examination of the *Herman* case quickly reveals that while it does treat the issue of over-activity upon the part of the trial judge, it in no way rules upon the issue of whether there is a special duty of impartiality required of the trial judge who has before him an accused whom he knows to have a history of mental illness. Petitioner respectfully argues that the *Herman* case is not the "complete answer."

Petitioner respectfully suggests that, under the facts of his case, the *Polisnik* case furnishes proper authority ruling upon the all-important aspect of the propriety of the trial judge's actions in light of his knowledge of Petitioner's history of mental disease.

C. THE TRIAL JUDGE, THROUGH PARTISAN INTERROGATION OF THE EXPERT MEDICAL WITNESS DURING THE COURSE OF WHICH HE REPHRASED THE CRUCIAL TESTIMONY OF THE NEUROPSYCHIATRIST INTO LEGAL TERMINOLOGY, FAILED TO OBSERVE THE DUTY OF SCRUPULOUS AVOIDANCE OF PARTISAN ACTION BEFORE THE JURY REQUIRED BY THE RULING IN *POLISNIK V. UNITED STATES.*

The court below in its opinion cited *Herman v. U.S.*, 289 F.2d 362, as "a complete answer" to the question raised by the Petitioner as Appellant below. While the authority of the *Herman* case, as stated above, might be quite adequate to control in a case where no knowledge by the trial judge of the accused's record of mental disease was involved, the Petitioner respectfully submits that, in view of the trial judge's knowledge of his record of legal insanity, that authority is inadequate in the case at bar.

The Petitioner pointed out below the number and the intensity of the trial court's questions and comments. However, the court below dismissed these contentions, citing as authority the *Herman* case *supra*.

Petitioner does not question the authority of the *Herman* case in a situation not involving mental illness, but respectfully suggests, given the trial judge's knowledge of Petitioner's record of mental disease, that his interrogation of Dr. McMahon, the Navy neuropsychiatrist, reveals a disregard of the duty of scrupulous avoidance of partisanship required by the holding of the *Polisnik* case *supra*.

For example, after the neuropsychiatrist testified as to what the defendant told him, the Court interrupted the examination with this question:

"Do you believe that?" (R. 65)

On the very next page of the record, after similar testimony by the expert witness, the Court again interrupted in the same manner:

"Do you believe this?" (R. 66)

It is not difficult to imagine that such repetitious and pointed interrogation by the principal actor in the courtroom drama would adversely affect the jury as to the credibility of the defendant, who, at that time, had not yet taken the witness stand.

Finally, we find the Court actually re-phrasing the medical terminology of the neuropsychiatrist into legal vocabulary - *the language of conviction!*

On page 68 of the record, the following colloquy took place between the Court and the expert witness for the government:

> "THE WITNESS: I think what we said is that we have a personality diagnosis which indicates that the individual may break rules, regulations, and so on, without any particular respect for them and withhold information which might lead to his coming under some form of discipline. This would not be inconsistent with that diagnosis.
>
> "THE COURT: In other words, *you mean to say* withhold information so that it would be *deliberate?* [Italics added]
>
> "THE WITNESS: It *could* be." (R. 68) [Italics added]

It was just such an open expression of the trial judge's attitude toward the testimony of the expert witness, given there in his instructions to the jury, that caused the Court of Appeals for the District of Columbia to reverse in *Polisnik v. United States*, 259 F.2d 951:

> " • • • In his further testimony, however, in answer to defense counsel's re-examination he [the psychiatrist-expert witness] said that appellant at the time the checks were allegedly forged and passed might have been suffering from a psychosis, adding that he had seen individuals who have been suffering from a psychosis and yet able to carry on in a fairly normal manner, and he supposed one could be very clever at the time and still be suffering from a psychosis. Notwithstanding this, the trial judge stated to the jury in his

charge that if the appellant had been in a disturbed state at the time, he could not have planned and carried out the crimes charged in the indictment.' This seems to us to have pointedly conveyed to the jury an inaccurate appraisal by the court of the full meaning of the crucial testimony of the doctor. Moreover, it practically told the jury that, not withstanding all that was before the court and jury respecting appellant's mental history, his mental disease if it existed could not have caused the crimes . . . . * * * Though the court said that the resolution of factual questions was for the jury we cannot escape the conviction that the jury might well have been influenced by the court's comments on the evidence; and since these comments tended forceably to deprive appellant of an impartial consideration of the evidence in an important respect we shall reverse and grant a new trial." 259 F.2d 951, at 953.

POINT TWO

THE TRIAL JUDGE'S PARTISAN ACTIVITY PREJUDICED PETITIONER'S RIGHT TO A FAIR TRIAL AND WAS PLAIN ERROR REQUIRING REVERSAL, WITHOUT RESERVATION OF THE POINT BY PETITIONER'S TRIAL COUNSEL.

In *Taylor v. United States*, 222 F.2d 398 (C.A.D.C. 1955), the Court faced a set of facts similar to those in the case at bar. Taylor, convicted of robbery, house breaking and larceny, had a history of mental disease, just as does Petitioner. His only defense, similarly, was that of insanity. Taylor also was examined by a psychiatrist, who testified that he was suffering from "a sociopathic personality with an anti-social reac-

tion", but was not insane. This testimony resembles that of the Navy neuropsychiatrist in the case at bar, who said that Bowling was maladjusted, but that his mental disease, epilepsy, was not involved in his anti-social behavior. (R. 57-58)

In reversing Taylor's conviction, the Court of Appeals of the District of Columbia stated the special significance of Rule 52(b) of the Federal Rules of Criminal Procedure in prosecutions involving mental incompetence of the accused:

> "Plan errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Rule 52(b), *Federal Rules Criminal Procedure, 18 U.S. Code Ann.* "We have repeatedly applied this rule to errors in admitting evidence and instructing juries. [Citing cases.] *It is especially appropriate when the mental competence of the accused is in question. His competence cannot be assumed and his rights disregarded because he has done the physical acts charged.* 222 F.2d 298, at 404. [Italics added.]

CONCLUSION

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

ZACH H. DOUGLAS
505 Lynch Building
Jacksonville, Florida

Attorney for Maurice Guy Bowling, Petitioner

PROOF OF SERVICE

I hereby certify that I have made service of three (3) copies of the foregoing Petition for Certiorari upon the Solicitor General, Department of Justice, Washington 25, D. C., by depositing same in an envelope so addressed and placing the same in the United States Post Office at Jacksonville, Florida, on the 10th day of October, 1963, with sufficient postage thereon to insure delivery.

ZACH H. DOUGLAS
505 Lynch Building
Jacksonville, Florida

Attorney for Maurice Guy Bowling, Petitioner

I further certify that I have also mailed, in the course of mail, a copy of the foregoing petition to the Honorable Donald C. Lehman, Assistant U. S. Attorney for the Southern District of Florida; on the 10th day of October, 1963, with postage thereon fully paid.

ZACH H. DOUGLAS
Attorney for Petitioner

APPENDIX "A"

In The
United States Court of Appeals
For the Fifth Circuit

No. 19,939

MAURICE GUY BOWLING,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(July 30, 1963.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DeVANE, District Judge.

DeVANE, District Judge: This is an appeal from the United States District Court for the Southern District of Florida from a judgment of conviction entered against appellant consequent upon a jury verdict. The case was tried in Jacksonville, Florida, which was at that time a part of the Southern District of Florida, but which is now within the Middle District of Florida.

Appellant was indicted under Title 26 U.S.C. charged with four violations of the alcohol tax laws. A jury found appellant guilty on three counts, the fourth count having been dismissed by the Government. This appeal followed.

Following his plea of not guilty, defendant filed in the case a "suggestion of incompetency at the time of the alleged offense" and the Court ordered a mental examination of defendant by Dr. George J. McMahon of the United States Naval Corps at Jacksonville. At the trial the only real issue was that of the defendant's competency at the time he committed the offenses. Defendant contended that he had no recollection of the criminal acts by reason of psychomotor epilepsy. It was uncontradicted by any evidence in the case that defendant actively participated in the acts for which he was indicted.

The issue of defendant's competency at the time the offenses were committed was resolved against him by the jury's verdict of guilty. It is conceded by appellant that the trial Court's charge on the issue of competency was proper. Appellant merely seeks to show that the remarks and attitude of the trial Judge were such as to prejudice the defendant in the eyes of the jury in its consideration of defendant's insanity.

Attached to defendant's suggestion of incompetency was a report by Dr. William N. Chambers, a psychiatrist, dated July 31, 1958, covering an examination made by Dr. Chambers at a time when defendant was under prosecution for another alleged criminal act. The report was made a part of the Court file. Dr. McMahon, the neurologist appointed by the Court to examine appellant, who also testified at the trial, made repeated reference to this report as well as a medical history from the George Washington Hospital. Dr. Chambers reported in effect

that under McNaghten's Rule defendant could not distinguish between right and wrong by reason of epilepsy of the psychomotor type. Dr. McMahon did not agree with Dr. Chambers' report on this issue and this resulted in the question being submitted to the jury for determination.

Counsel for appellant makes reference to nine places in the record where the Court propounded questions to witnesses. Most of these questions were propounded to Government witnesses. The Court has examined what took place on each instance where the District Judge asked questions and the Court finds no evidence whatever of animosity on the part of the trial Judge towards appellant.

Counsel for appellant bases appellant's case primarily on remarks made by the District Judge at the time appellant was sentenced. The jury verdict was returned on July 12, 1962, at which time the defendant was adjudged guilty of the offenses for which he had been convicted. Imposition of sentence was deferred until July 27th and the Court requested a pre-sentence report to be delivered to him before the date of sentence. At the time appellant was sentenced the Court reviewed this pre-sentence report, which was most unfavorable to appellant, and it is what the Judge said at this time upon which appellant's charge of prejudice is based.

In making this charge appellant and his counsel overlook the fact that the District Court did not have this information during the trial of the case. The record establishes beyond doubt that the pre-sentence report was delivered to the District Judge almost two weeks after the jury trial had been completed and the jury verdict rendered. The remarks of the District Judge at this late stage of the case could not and did not in any way influence the jury.

What was said by Circuit Judge Wisdom in *Herman v. United States*, 289 F.2d 362, on the same issue is a complete answer to the question raised by appellant in this case and the Court relies upon the decision in the *Herman case* in finding and holding that this case should be and it is

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,939

D. C. Docket No. 11,461-Cr-J

MAURICE GUY BOWLING,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District for the Southern District of Florida.

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DeVANE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant: Maurice Guy Bowling, be condemned to pay the costs of this cause

in this Court for which execution may be issued out of the said District Court.

July 30, 1963

Issued as Mandate:

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19,939

MAURICE GUY BOWLING,

Appellant,

versus

UNITED STATES OF AMERICA

Appellee.

Appeal from the United States District Court for the Southern District of Florida

(September 12, 1963)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DeVANE, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is hereby DENIED.

APPENDIX "D"

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 19939

MAURICE GUY BOWLING

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days from September 12; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from September 12 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from September 12, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

DOZIER A. DeVANE
United States District Judge.

Dated: (Original Filed - September 18, 1963)